Guaranteed Asset Protection (GAP) Waivers Fact Sheet (HB 4989 through 4992)

- A Guaranteed Asset Protection (GAP) Waiver is a two party waiver between a creditor and a borrower (or lessee) whereby the creditor agrees to forgive balance of a loan or lease after the borrower's primary auto insurance proceeds have been applied following the total loss of a leased or financed vehicle. In short, **if you owe more on the loan than the value of your insurance claim (for a total loss), the balance of the debt is forgiven.**
- GAP Waivers can be purchased from creditors, including banks, credit unions, finance companies, and retail installment sellers (such as auto dealerships). They amend and become a part of the terms of the loan or finance agreement.
- GAP Waivers provide financial security and peace of mind of borrowers and lessees, by protecting them from a potentially large, unforeseen expense in the event of a total loss of a financed vehicle.
- A GAP Waiver is **NOT a form of insurance**. They cannot be substituted for auto insurance. There is no spreading of risk among policyholders. A GAP Waiver is distinct from GAP Insurance, which is offered by insurance companies, and promise to pay the outstanding loan balance on behalf of the borrower, rather than forgiving the remaining balance, as in the case of a GAP Waiver. GAP Waivers do not 'pay off' the balance of the loan.
- Michigan currently does not regulate GAP Waivers as insurance (see attached Declaratory Ruling, Order No. 04-053-M).
- Legislation is needed because this regulatory regime is currently controlled only in this ruling, and not in Michigan Law. Codifying this regulatory regime will provide long term clarity to institutions such as auto dealers and local credit unions. Furthermore, if the attached ruling was ever overturned, federally regulated institutions (e.g. federally chartered banks), would be competing under a different set of rules from Michigan based and regulated companies. Codifying regulation of GAP Waivers in Michigan will protect Michigan businesses from being placed at a competitive disadvantage should some future OFIR Commissioner rescind or materially amend the Declaratory Ruling.

Guaranteed Asset Protection (GAP) Waivers
An Overview

This overview provides information about **guaranteed asset protection waivers** for motor vehicles, sometimes referred to as debt cancellation agreements, including who offers them, who buys them, how they work, and important legislation being proposed to regulate them.

What is a Guaranteed Asset Protection (GAP) Waiver?

In simple terms, it is a **two-party** waiver between a **creditor** and a **borrower** (or lessee), wherein the creditor, or its assignees, agrees to forgive or waive the balance of a loan or lease after the borrower's (or lessee's) primary auto insurance proceeds have been applied following the total loss of a financed or leased vehicle.

Who offers GAP Waivers ?

GAP waivers can be purchased from a variety of **creditors** including *banks, credit unions, finance companies* and *retail installment sellers.* The most common form of retail installment seller is likely your local automobile dealership. All of these creditors are regulated under state banking laws and/or consumer finance laws.

A car buyer can elect to purchase a GAP waiver when financing the purchase or lease of a vehicle. The GAP waiver amends and becomes part of the terms of the loan or finance agreement. As with originators of mortgages, sometimes the initial creditor under a loan or finance agreement "sells" its agreements to another creditor which is known as an assignee, and which ultimately "owns" the loan, services the account and receives payments made by the borrower for the loan. This does not happen with all loans or retail installment contracts, but if it does, the assignee remains contractually required to honor the terms of the original GAP waiver as it is a part of the original loan or other financing instrument.

Similarly, a car buyer can elect to purchase a GAP waiver when leasing a motor vehicle. The GAP waiver amends and becomes a part of the terms of the lease and can serve to waive difference between the primary auto insurance proceeds, or actual cash value of the vehicle and the lease payoff amount, in the event of the total loss of the vehicle being leased.

Why do consumers buy GAP Waivers?

Consumers buy GAP waivers for two reasons: to protect themselves financially and for peace of mind when they finance what may be one of their most valuable assets....their personal automobile, truck, van, etc., Your car or truck is most likely your primary means of transportation for getting to and from work or taking part in family and leisure activities. We all know that a car depreciates significantly the moment it is driven off the car lot. Unfortunately, a consumer's loan balance is *not* reduced at the same pace. As the cost of automobiles climb higher, the difference between a consumer's loan payoff and actual cash value of the car can be thousands of dollars. For a consumer to handle such a significant unforeseen out-of-pocket expense in the event of a total loss of the vehicle can be very stressful and often, financially challenging.

Do creditors really waive the loan balance for the borrower ?

Yes, they do. Many creditors believe GAP waivers are a key part of the portfolio of financial protection choices they make available to their customers. Creditors are sophisticated enough to extend credit, manage their financing practices and continue to provide quality banking and other financial services. Some creditors choose to purchase insurance to cover their obligations under GAP waivers they have offered. This is done through a *separate agreement,* called a contractual liability insurance policy between an **insurance company** and the **creditor**, whereby the insurance company promises to pay the insured creditor for any loan balances that it waives or cancels through its GAP waivers. The insurance policy does not offer any benefit to the borrower or lessee, and is not referenced in, nor a part of, the GAP waiver agreement. The purchase of such insurance by a creditor does not have any bearing on the creditor's contractual obligations to the borrower under its GAP waivers. Each agreement stands on its own.

How is GAP different from insurance?

GAP waivers are not insurance, and cannot be substituted for automobile collision insurance. The difference between debt protection products and traditional insurance was noted in *First National Bank of Eastern Arkansas v. Taylor*, Id. at 780., wherein the court stated:

> Although debt cancellation contracts may...transfer some risk from the borrower to the bank, contracts do not require the bank to take an investment risk or to make payment to the borrower's estate. The debt is simply extinguished. Thus, the primary and traditional concern behind state insurance regulation – the prevention of insolvency – is not of concern to a borrower who opts for a debt cancellation contract.

Under a GAP waiver the creditor does not assume the obligation or the position of the borrower. The creditor is not required to accumulate reserves in order to fulfill an assumed obligation of the borrower. The creditor simply cancels a contractual obligation.

The United State Supreme Court in *Union Labor Life Ins. Co. v. Pereno, 458 W.S. 119, 129 (1982)* set forth three criteria in determining whether "the business of insurance" was being undertaken:

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Applying these criteria, a GAP waiver is not insurance since there is no spreading of risk among policyholders. Additionally, the GAP waiver is not an integral part of the relationship between the borrower and the creditor; the loan, lease or finance agreement is the integral business purpose. Finally, the practice of offering debt protection products is widely accepted within the financial institutions industry as well as the retail installment and motor vehicle dealership industry. While there are similar contracts offered by insurance companies, they differ in that they promise to *pay* the outstanding loan balance *on behalf of the borrower* in order to satisfy the loan. The promise is made by the insurance company, not the creditor. GAP insurance is offered by the insurance industry as a form of credit insurance such as credit life or credit disability insurance, which pays off the balance of a loan in the event of death or disability of the borrower. **GAP Waivers do *not* "pay off" the balance of the loan;** the promise is made by the creditor who waives or cancels the loan balance.

Additionally, GAP waivers are very similar to collision damage waiver provisions in contracts between automobile rental agencies and a person renting a car, whereby the rental agency, for an additional fee, agrees to waive any liability that the renter may have for collision damage to the rental car. Several reported decisions throughout the country hold that these provisions are not insurance. See *Truta v. Avis Rent-A-Car System*, 238 Cal. Rptr. 806 (Cal. App. 1987); *Chabraja v. Avis Rent-A-Car System*, 549 N.E. 2d 872 (Ill. App. 1989); *Hertz Corp. v. Corcoran*, 520 N.Y.S.2d 700 (N.Y. Sup. Ct. 1987). In the same way that an automobile rental agency can, as a matter of contract, accept liability for damage to its own property without being considered an insurer, **a creditor can identify by contract a circumstance under which the creditor will consider a debt to be fully or partially cancelled.**

In Truta, 238 Cal. Rptr. at 813, the California court made a basic point regarding automobile leasing that is analogous to GAP waivers just as well:

> Since the lessor is not agreeing to pay anybody anything, but is simply agreeing not to hold the lessee liable, there is no need for accumulating reserves. The solvency or insolvency of the lessor does not affect this contractual provision.

Another California court has followed the same theory in a recent debt cancellation program offered by a car finance lender in *Automotive Funding Group, Inc. v. Garamendi*, (App 2 Dist. 2003) 7 Cal. Rptr. 3d 912, 114 Cal. App. 4th 846.

Why is legislation necessary?

National banks have been specifically authorized to enter into debt cancellation contracts since 1964 when the United State Comptroller of the Currency recognized such contracts were a lawful exercise of banking powers. 12 C.F.R § 7.1013 (1999). Federal cases later established such contracts did not constitute the "business of insurance" which is regulated by the states under the McCarran-Ferguson Act. *First National Bank of Eastern Arkansas v. Taylor*, 907 F. 2d 775 (8th Cir.), cert. denied, 498 U. S. 972 (1990).

Legislation is necessary to clarify that all forms of creditors, including automobile dealers and other financers of automobile loans or leases are not in the business of insurance when offering GAP waivers in connection with the loan, finance or lease agreements. Otherwise, federally regulated financial institutions in each state may continue to offer GAP waivers under the federal rules, while separate requirements or restrictions could apply to state regulated creditors. All creditors should have the opportunity to offer these products equally. Also, uniform waiver disclosures as well as industry practices are appropriate to ensure the viability of these products and a framework for meaningful consumer protections.

Where do we go from here?

The vast majority of states recognize some kind of exception under the insurance code for debt cancellation and/or GAP waivers and have held that such agreements do not constitute insurance. Unfortunately, the majority of these exceptions are not codified in law, but only as pronouncements by the insurance departments through bulletins, letters or informal opinions. This model act measure is a beginning to formally codify in a systematic way these regulatory pronouncements, while simultaneously instituting protections for consumers and best practices for this industry.

STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE SERVICES

Before the Commissioner of Financial and Insurance Services

In the matter of the sale of debt cancellation contracts and debt suspension agreements by depository institutions

Order No. 04-053-M

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Issued and entered
this 18th day of June 2004
by Linda A. Watters
Commissioner

DECLARATORY RULING

I
BACKGROUND

When a depository institution enters into a debt cancellation contract ("DCC") in connection with an extension of credit, it agrees to cancel the outstanding debt upon the occurrence of a specified event, such as the death of the borrower. Under a debt suspension agreement ("DSA") in connection with an extension of credit, a depository institution agrees to suspend loan payments upon the occurrence of a specified event, such as the disability of the borrower.

The Office of the Comptroller of the Currency ("OCC") has over the years issued opinions that national banks were authorized by federal laws to sell DCCs and DSAs. This was confirmed by the passage of the Gramm-Leach-Bliley Act of 1999.

In that Act, Congress expressly allowed national banks to provide insurance as principal with respect to authorized products. Section 302(b) of the Act, 15 USCS 6712(b), provides:

> **Authorized products.** For the purposes of this section, a product is authorized if--
>
> (1) as of January 1, 1999, the Comptroller of the Currency had determined in writing that national banks may provide such product as principal, or national banks were in fact lawfully providing such product as principal;...

The OCC had made such a determination before January 1, 1999, as to DCCs and DSAs.

As mandated by the Act, the OCC promulgated rules that took effect June 2003. [12 CFR part 37] These rules established that states have no role in regulating the price, content, or marketing of DCCs and DSAs when sold by national banks.

Agencies regulating federally chartered thrifts and credit unions have separately concluded that those depository institutions may sell DCCs and DSAs. Moreover, most states stopped regulating these contracts as insurance products years ago. Experts predict that within a few years these contracts will supplant similar credit insurance products that have been widely sold for over 50 years.

In examining the sale of DCCs and DSAs, all depository institutions should be taken into account. For purposes of this Declaratory Ruling, "depository institution" has the meaning given in Section 1201(s) of the Michigan Banking Code of 1999, as amended, MCL 489.11201(s), which provides:

> "Depository institution" means a bank, out-of-state bank, national bank, foreign bank branch, association, savings bank, or credit union organized under the laws of this state, another state, the District of Columbia, the United States, or a territory or protectorate of the United States.

Michigan chartered depository institutions compete with federally chartered depository institutions. The Michigan Legislature has made it abundantly clear that in interpreting and expanding upon powers of Michigan chartered depository institutions,

the Commissioner shall take competition with federally chartered depository institutions into account.

The importance of competition in banking is underscored by Section 2102 of the Banking Code of 1999, as amended ("Banking Code"), MCL 487.12102, which states as follows:

> This act shall be implemented by the commissioner to maximize the capacity of banks to offer convenient and efficient financial services, to promote economic development, and to ensure that banks remain competitive with other types of financial service providers.

While no expansion of powers would be needed as to the sale of DCCs and DSAs, it is instructive that the Legislature authorizes the Commissioner to take into account federal regulations in assessing competition. Section 2204 of the Banking Code, MCL 487.12204, provides:

> (1) The commissioner may issue declaratory rulings in accordance with the administrative procedures act of 1969, or issue orders on applications by 1 or more banks to exercise powers not specifically authorized by this act that will authorize banks to exercise powers appropriate and necessary to compete with other providers of financial services.
>
> (2) In the exercise of the discretion permitted by this section, the commissioner shall consider the ability of banks to exercise any additional power in a safe and sound manner, the authority of depository institutions operating under state or federal law or regulation, the powers of other competing entities providing financial services, and any specific limitations on bank powers contained in this act or in any other law of this state. The commissioner shall give notice, at least quarterly, to all banks of declaratory rulings, orders, or determinations issued during the preceding quarter under this section. [Emphasis added.]

Similarly, the Legislature has directed the Commissioner to, "...ensure that savings banks remain competitive with other types of financial institutions and providers of financial services," in Section 201(2) of the Savings Bank Act, MCL487.3201(2).

Finally, by Section 208(2) of the Credit Union Act, MCL 490.208(2), in evaluating a request for additional powers by a domestic credit union, the Commissioner "...shall consider...the powers of other competing entities providing financial services..."

The Michigan Legislature has called for a level playing field. However, as seen above, federally chartered depository institutions currently enjoy an advantage in their ability to offer DCCs and DSAs. Compared to credit insurance products, DCCs and DSAs are flexible with respect to price, terms, and marketing.

II
ANALYSIS

It is appropriate at this time for the Commissioner to apply an analysis that focuses upon the principal object and purpose of the loan agreement. Even though DCCs and DSAs have an element of risk transfer, their inclusion in a loan agreement directly or by addendum does not change the essential character of the loan agreement.

This line of analysis was adopted regarding warranties in Declaratory Ruling 95-254-M. At issue was an automobile warranty that covered collision damage.

This agency has long recognized that warranties are distinct from insurance. In determining that the insurance element of the warranty did not make the warranty into an insurance contract, the agency focused upon the primary object and purpose of the warranty contract.

The declaratory ruling contains an ample discussion of authority on this issue. At the core of its reasoning is a quote from *Transportation Guarantee Co v Jellins*, 29 Cal 2d 242, 249 (1946), where the Court quoted from a federal decision as follows:

> "That an incidental element of risk distribution or assumption may be present should not outweigh all other factors. If the attention is focused only on that feature, the line between insurance or indemnity and other types of legal arrangement and economic function becomes faint, if not extinct. This is especially true when the contract is for the sale of goods or services on contingency. But obviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts, particularly conditional sales and contingent service agreements. The fallacy is in looking only at the risk element, to the exclusion of all others present or their subordination to it.
>
> The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose."

The principal object and purpose of a loan agreement is the loan itself, not an incidental provision concerning certain events that may arise during the course of the loan. The conditional cancellation or suspension is only one term of the overall loan agreement. Thus, a loan agreement does not constitute an insurance contract due to the related sale of DCCs and DSAs. A depository institution should not be regulated as an insurer in its offering of these products.

Declaratory Ruling 98-105-M concerned banks selling DCCs. Under Section 402 of the Michigan Insurance Code of 1956, as amended ("Code"), MCL 500.402, a person must be licensed as an insurer in order to transact insurance. Since banks cannot be licensed as insurers, the agency concluded that they could not sell DCCs.

This declaratory ruling reaches a different result because, unlike the previous declaratory ruling, it applies the "principal object and purpose" test in deciding whether the sale of DCCs and DSAs constitute the transaction of insurance. Thus, Declaratory Ruling 98-105-M is changed prospectively and superseded by this declaratory ruling.

This declaratory ruling is limited to the sale of DCCs and DSAs by depository institutions and is limited to MCL 500.402.

III
RULING

Therefore, based upon the application of the principal object and purpose test, it is the Commissioner's ruling with regard to depository institutions that:

1. Loan agreements do not become subject to the Code due to the sale of related DCCs and DSAs. The principal object and purpose of a loan agreement is the loan itself.
2. The sale of DCCs and DSAs does not subject depository institutions to licensure requirements under MCL 500.402.
3. The Code does not regulate DCCs and DSAs because their inclusion in a loan does not change the essential character of the loan agreement.
4. The Code does not regulate depository institutions in their sale of DCCs and DSAs in connection with an extension of credit.
5. This declaratory ruling prospectively changes and supersedes Declaratory Ruling No. 98-105-M.

Linda A. Watters
Commissioner

STATE OF MICHIGAN
DEPARTMENT OF COMMERCE
INSURANCE BUREAU

Before the Commissioner of Insurance

In the matter of a request for a
Declaratory ruling regarding
Debt cancellation contracts

Order No. 98-105-M

Issued and entered
this 24th day of August 1998
by E.L. Cox
Commissioner of Insurance

DECLARATORY RULING

By a letter dated July 21, 1995, North bank of Hale, Michigan and First Northern Bank & Trust of Manistique, Michigan ("Petitioners") requested the Commissioner of insurance ("Commissioner") to issue a declaratory ruling finding that debt cancellation contracts are not insurance. They further requested that, in the event the Commissioner decided that such contracts are insurance, he address the ability of banks to enter into such contracts pursuant to Section 151(36) of the Banking Code of 1969, as amended ("Banking Code"), MCL 487.451 (36); MSA 23.710(151)(36), and further set forth what licensing requirements they must abide by, if any, pursuant to the Insurance Code of 1956, as amended ("Insurance Code"), MCL 500.100 et seq; MSA 24.1100 et seq.

The Commissioner is authorized to issue a declaratory ruling by Section 63 of the Administrative Procedures Act of 1969, as amended, MCL 24.263; MSA 3.560(263), which provides:

> On request of an interested person an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

The Petitioners are obviously interested persons as to the sale of debt cancellation contracts by banks. Their request relates to an actual state of facts in that intend to commence selling these

policies if it is lawful to do so. Their request as to whether these contracts constitute insurance is properly addressed to the Commissioner, who administers the Insurance Code. The Insurance Code governs the sale of insurance in this state. It is therefore appropriate to issue this declaratory ruling.

In OAG, 1964, No.4351, p. 473 (September 22, 1964), the Attorney General concluded that the use of debt cancellation contracts by a bank whereby the bank undertakes to cancel the balance of a debt in the event of the death of a debtor constitutes insurance subject to the provisions of the Michigan Insurance Code and the supervision and regulation by the Michigan Insurance Bureau. This conclusion finds support in the case law of several jurisdictions including Attorney General v CE Osgood Co, 249 Mass 473; 144 NE 371 (1924), Ware v Heath, 237 SW.2d 362 (1951), Douglass v Dynamic Enterprises Inc d/b/a Car-Mart 315 Ark 575; 869 SW2d 14 (1994), and Luc Leasing Corp v Muhl, 172 Misc 2d 753; 659 NYS2d 422 (1997).

Petitioners suggest that the Commissioner should reach a contrary opinion in light of First National Bank of Eastern Arkansas v Taylor, 907 F2d 775 (8th Cir, 1990), cert den 111 S Ct 442 (1990). However, based upon a review of the Attorney General opinion, the 8th Circuit court case, proceedings of the National Association of Insurance Commissioners ("NAIC") dating back to 1964, the Banking Code, the Insurance Code, and case law, the opinion expressed by the Attorney General is correct.

By way of background, in early 1964 the Comptroller of the Currency issued an "interpretive ruling" permitting national banks to offer debt cancellation contracts. This interpretive ruling was later published in 12 CFR S 7.7495, which provides that:

> A national bank may provide for losses arising from cancellation of outstanding loans upon the death of borrowers. The imposition of an additional charge and the establishment of necessary reserves in order to enable the bank to enter into such debt cancellation contracts are a lawful exercise of the powers of a national bank and necessary to the business of banking.

Apparently, the issue remained dormant from the time of the Comptroller's interpretive ruling to the 1990 opinion to the 8th Circuit Court of Appeals. In Michigan, rather than writing debt cancellation contracts, financial institutions, as group credit life insurance policy holders pursuant to Section 4416 of the Insurance Code, MCL 500.4416; MSA 24.14416, have provided credit life insurance to borrowers by enrolling the borrowers into groups.

Now a company named North Central Administrators, Inc., out of St. Paul, Minnesota, has developed what they call a debt cancellation program to administer debt cancellation agreements sold by banks to their customers. North Central Administrators, Inc. is an affiliate of North Central Life Insurance Company. It claims to be able to provide banks with the necessary systems, forms,

management reports, and actuarial and other expertise for banks to install and operate this debt cancellation program. There may be other entities marketing similar programs.

In a January 26, 1993 letter to Russell S. Kropschot, Chief Deputy Commissioner of the Michigan Financial Institutions Bureau, North Central Administrators, Inc. stated expressly that: "Debt cancellation agreements function like credit life insurance..." Furthermore, in an interpretive letter of the U.S. Comptroller of the Currency, letter #96, dated May 14, 1979, in responding to an inquiry whether a national bank may purchase stock in an insurance company that underwrites credit insurance, the following was stated:

> The Federal Reserve has, however, allowed bank holding companies to engage in the underwriting of credit life, health and accident insurance, and the Comptroller allows the equivalent for national banks through the issuance of 'debt cancellation contracts' and the establishment of necessary reserves. See 12 CFR 225.4(a)(10) and 12 CFR 7.7495 respectively. [emphasis added]

Thus, there is recognition by the Comptroller, and the marketing company itself, that the issuance of debt cancellation contracts by a national bank and the establishment of necessary reserves constitute the equivalent of engaging in the underwriting of credit insurance.

The NAIC has consistently taken the position that the use of debt cancellation contracts constitutes the business of insurance for which state insurance laws and regulations are applicable. In June 1964, at the NAIC meeting in Minneapolis, Minnesota, the Federal Liaison Committee passed a resolution giving notice to the Comptroller and all national banks of opposition to what was deemed to be a violation of state law, resolving that:

1. The National Association of Insurance Commissioners direct the Federal Liaison committee to confer with the Comptroller of the Currency concerning his letter rulings and to indicate its opposition thereto as said letter rulings would purport to authorize a national bank to engage in the business of insurance without complying with the insurance laws and regulations of the state in which it is located.

2. Each Commissioner determine whether the Comptroller's letter rulings conflict with the insurance laws and regulations of his state, and, if so, advise the Comptroller and the National Banks within his state to that effect, and further, to take such other action as he deems appropriate in the circumstances. [emphasis added]

In 1980 the NAIC in Los Angeles approved the recommendation of the Committee that the NAIC reaffirm its position as set forth in the 1964 resolution and that the resolution be sent to the

Comptroller and to all Commissioners for forwarding to all national banks within their respective jurisdictions. See 1980 NAIC proceedings, Vol. II, p 662.

Following the NAIC'S original resolution Michigan Commissioner of Insurance, Alan L. Mayerson, requested an opinion of the Attorney General asking (1) whether a bank which enters into debt cancellation contract with its debtors is engaged in the business of insurance, and (2) if so, whether the regular execution of such contract is subject to the supervision and regulation by the Insurance Bureau under the Insurance Code. In his opinion request, Commissioner Mayerson emphasized the fact that "just as an insurance company would collect a premium and set aside life insurance reserves based on actuarial computations, the banks would make a charge identical to a premium and establish loss reserves equivalent to an insurer's life insurance reserves. In short, the bank would act both as lender and insurer." Further, Commissioner Mayerson expressed his belief that debt cancellation contracts by banks promising to cancel the debt on the death of the debtor is a contract of life insurance, and that such activity constitutes the doing of an insurance business, which is subject to the laws of the state under the McCarren-Ferguson Act.

The fact that charges to the bank's customers would in part go toward establishing a reserve determined on an actuarial basis to protect the bank against losses is underscored in a letter dated March 10, 1964 from James J. Saxon, U.S. Comptroller of the Currency in which he addressed certain questions from the president of a national bank concerning debt cancellation contracts. There, the Comptroller stated in pertinent part:

> You are correct in your assumption that this ruling means that a national bank may make additional charges to borrowers for the purpose of creating a fund out of which the balance due on a loan would be paid in the event the borrower died. I direct your attention to the specific questions asked of the Comptroller as follows:
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> 1. Can the additional charge be made only on selected customers?
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> The bank may, in its discretion, determine whether to adopt standards such as age and health of the borrower, in making debt cancellation contracts available to its customers.
>
> 2. Does the debt cancellation contract referred to mean that the debt will automatically be canceled in the event of the borrower's death?
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> Yes. The debt cancellation contract is understood to mean the bank's agreement to waive its claim or right to the unpaid balance of the loan at the death of the borrower.

3. Can a provision be inserted in the contract to the effect that the borrower must be in sound health when the contract is made?

The bank in its discretion may require the borrower to certify that to his best knowledge he is free from certain specified health hazards.

4. Do all charges go into reserve or is the reserve determined on a actuarial basis?

Charges should be placed in reserves to the extent necessary to protect the bank against loss incurred in connection with debt cancellation contracts. Such reserves may be determined by the use of accepted and reliable methods, including the use of an actuarial basis.

5. Can the charges collected and credited to the reserves be excluded from income until such time as taken out of the reserve?

The bank may exclude from income those charges collected and credited to reserves but which have not been taken out of reserves. However, upon the adoption of such practice, accounting recognition must be given to the requirements of the Internal Revenue Code of 1954 and regulations promulgated thereunder relating to the extent to which loss reserves are not subject to income tax.

6. Is there a limit to the amount of the reserves?

The reserve should be limited only after it affords adequate protection to the bank from actual and anticipated losses from debt cancellation contracts.

7. Will this type of contract be considered as engaging in the life insurance business?

The use of debt cancellation contracts, the imposition of an additional charge, and the establishments of reserves as protection against losses arising out of such contracts is a lawful exercise of the powers of a National Bank. The exercise of such powers is necessary to and is a part of the business of banking. Such activities may not, therefore, properly be considered as engaging in the life insurance business.

Thus, it is clear that the bank will underwrite and there will be additional charges which the Comptroller says should be placed in reserves to the extent necessary to protect the bank against loss incurred in connection with debt cancellation contracts. These reserves, according to the Comptroller, may be determined on an actuarial basis. The reserve is specifically deemed to afford adequate protection to the bank from "actual and anticipated losses" from debt cancellation contracts.

State chartered banks in Michigan do not have the authority to operate an insurance underwriting business: Section 151(7) of the Banking Code, MCL 487.451; MSA 23.710 (151), provides as to permissible powers of state chartered banks that:

> Subject to the limitations and restrictions contained in the act or in a bank's articles, the bank may engage in the business of banking and a business related or incidental to banking, and for that purpose, without specific mention thereof in its articles, a bank has the powers conferred by this act and the following additional corporate powers:
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> * * *
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> (17) to make application for and to obtain insurance of loans, but not to operate an insurance underwriting business. [emphasis added]

Consistent with Section 4416 of the Insurance Code, a state chartered bank's power "to make application for and to obtain insurance on loans..." suggests very strongly the position of the legislature that the bank itself not be in the insurance business.

Section 151(31) of the Banking Code, MCL 487.451(31); MSA 23.710(151)(32), allows state chartered banks to exercise all incidental powers necessary to carry on the business of banking. In addition, the FIB Commissioner is given the authority to promulgate rules and issue declaratory ruling and orders to exercise powers not specifically authorized in the Banking Code. This FIB Commissioner is permitted in his discretion to authorize banks to exercise the powers "appropriate and necessary to compete with other financial institutions operating pursuant to federal law or regulation." However, there exists an express prohibition against operating an insurance underwriting business. No incidental powers can be authorized which directly conflicts with a power expressly denied.

As to whether the cancellation of a debt in case of death constitutes insurance:

> It has been held that a contract providing that the obligation thereof shall be canceled in case of death or other extrinsic event is a contract of insurance. Thus, a loan contract by which the borrower is to make periodical payments for a term of

> years, but such payment is to cease if he should die within the term, has been held to be a contract of life insurance, [43 Am Jur2d, Insurance, S 9, Cancellation of debt in case of death or other extrinsic event, p 83]

It has further been held that:

> ...an undertaking on the part of one selling merchandise on the installment plan to cancel the debt in case the buyer dies before the installments are all paid constitutes insurance, as does an agreement to cancel the balance due on a loan in the event of the death or disability of the borrower...[Couch on Insurance 2d, 1:14, Obligation cancelable on death, p 72]

In Michigan, credit insurance is regulated by the Insurance Commissioner under the Credit Insurance Act, 1958 PA 173, MCL 550.601 et seq; MSA 24.568(10) et seq, and Credit Insurance Rules, R 550.201 et seq. Debt cancellation contracts, on the other hand, would not be regulated by rate, form, loss ratio, or commission rules, and there would be no capital or surplus guidelines or reserve requirements to insure solvency of the financial institution.

As discussed above, the writing of credit life insurance by a bank is not properly incidental to the bank's expressly authorized lending power. It is very difficult to view debt cancellation agreements as "necessary" to carry into effect a bank's express lending power when banks have not done so even in light of the Comptroller's ruling almost thirty years ago. There is a distinction to be made between a bank procuring credit life insurance on its borrowers through an insurance company regulated under the laws of the State of Michigan as opposed to a bank's unregulated self-insurance. While the federal case law has liberalized the concept of "necessary" to "useful or convenient" in the context of a bank's incidental power, this was not meant to allow banks to engage in the business of insurance.

The National Bank Act does not preempt the Insurance Commissioner's authority to prohibit a bank from offering debt cancellation contracts which constitute the business of insurance. As noted in the Attorney General's opinion, national banks are subject to state laws which do not interfere with the purposes of their creation or conflict with express powers given them by federal law. Peoples Savings Bank v Stoddard, 359 Mich 297, 328 (1960); Attorney General ex rel Banking Commissioner v Michigan National Bank, 298 Mich 417, 426 (1941). In any event, the McCarren-Feguson Act would limit the preemptive power of the National Bank Act. When a state has enacted statutes which regulate the "business of insurance" within the meaning of the McCarren-Ferguson Act, such state statutes will prevail unless Congress has otherwise provided in legislation specifically pertaining to insurance, which it has not done here.

This is not attempt to apply McCarren-Ferguson to entities commonly thought to be outside the insurance industry. Rather, the debt cancellation activity which the banks wish to engage in is credit life insurance, which has always been subject to state insurance regulation. To that extent, the court's reference to Group Life and Health Insurance Co, v Royal Drug Co, 440 US 205; 99 S Ct 1067; 59 L Ed 2d 261 (1979), is misplaced. Likewise, this is not an attempt to apply the McCarren-Ferguson Act in a way to give the state power to regulate beyond that power which the state was thought to possess prior to United States v Southeastern Underwriters Assoc, 322 US 533; 64 S Ct 1162; 88 L Ed 1440 (1944). The regulation of credit life insurance has been and is properly within the state's power to regulate insurance. Section 4416 dates back to 1917.

The 8th Circuit case is not controlling in the 6th Circuit . A court of appeals decision is bound by prior decisions of its own circuit. United States v Cooper 462 F2d 1343, (CAS 1972) cert den 409 US 1009; 34 L Ed 2d 303; 93 S Ct 452. While the opinions of other circuits are entitled to great respect, United States v Eddy Bros. Inc., 291 F2d 529 (CA8 1961), they are not binding, and should not be followed when they are erroneous. Jaben v United States, 333 F2d 535, (CA8 1964) affd 381 US 214: 14 L Ed 2d 345; 85 S Ct 1365, reh den 382 US 873; 15 L Ed 2d 114; 86 S Ct 19, Allstate Ins. Co. v Stevens, 445 F2d 845 (CA9 1971); Brown v United States, 338 F2d 543 (CADC 1964).

Further, the fact that the U.S. Supreme Court denied certiorari is not definitive. The denial of a writ of certiorari imports no expression of opinion upon the merits of a case. United States v Carver, 260 US 482; 67 L Ed 361; 43 S Ct 181 (1923); Maryland v Baltimore Radio Show Inc,. 338 US 912; 94 L E3 562; 70 S Ct 252 (1950); Poiites v United States, 364 US 426; S L Ed 2d 173; 81 S Ct 202 (1960). A denial of certiorari is not to be equated with an affirmance of the judgment below, Hamilton-Brown Shoe Co v Wolf Bros & Co, 240 US 251; 60 L Ed 629: 36 S Ct 269 (1916). The court may well take the very next case raising the same question and reach a different result on the merits.

The Petitioners also argue that the Commissioner should take into account two recent declaratory rulings issued by the Commissioner respecting warranty programs that included incidental damage repair coverage. Those declaratory rulings focused upon specific warranty programs in connection with the sale or lease of motor vehicles. They did not address debt cancellation contracts and were not intended to have any application to those contracts.

The Petitioners asked the Commissioner to address the ability of banks to enter into debt cancellation contracts pursuant to Section 151(36) of the Banking Code. While the Banking Code is generally beyond the purview of the Commissioner, Section 151(36) relates directly to the Insurance Code:

> Subject to the limitations and restrictions contained in this act or in a bank's articles, the bank may engage in the business of banking and a business related or incidental to banking, and for that purpose, without specific mention in its